IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1095 OF 2002

1. Balasaheb Dattoba Badhe)
   Age : 30 years, Occupation :)
   Electrician.)

2. Indubai Dattoba Badhe)
   Age : 66 years, Occupation :)
   Household)

   Both residing at : Datta Ganesh)
   Apartments, Garmala, Dhayari)
   village, Taluka : Haveli,)
   Dist. Pune.)..Appellants

Versus

The State of Maharashtra)..Respondent

Smt.Revati Mohite-Dere for the appellants.

Smt.V.R.Bhosale, APP for the State.

Coram : S.B.Mhase &
R.S.Mohite,JJ

Date : 23.03.2007.

Oral Judgment : (Per : R.S.Mohite,J)

1. The appellants Balasaheb Dattoba Badhe and Indubai Dattoba Badhe (hereinafter referred to as ‘accused no.1 & accused no.2’ respectively) file this appeal impugning a Judgment and order passed by the Ad-hoc Additional Sessions Judge, Pune on 31.8.2002, disposing off Sessions Case No.46 of 2001. By the impugned judgment and order, both the accused are convicted for an offence punishable under Section 302 r/w 34 of IPC and have been

sentenced to suffer imprisonment for life and to pay a fine of Rs.500/- each, in default to suffer rigorous imprisonment of one month for accused no.1 and simple imprisonment of one month for accused no.2. The trial Court has also given the benefit of set off under Section 428 of Cr.P.C.

2. The brief facts of the prosecution case were as under :-

(a) The deceased Sarubai @ Vaishali was married to accused no.1 Balasaheb in or about the year 1995. Sarubai was the daughter of one Kundlik and Fulabai. Fulabai was the wife’s sister of (PW 1) Vilas Kondiba Chakankar.

(b) After her marriage, deceased Sarubai started residing at her husband’s place situated at Datta Ganesh Apartment, Garmala, Dhayari village, Taluka-Haveli, Dist. Pune. After her marriage, accused no.2 Indubai who was the mother-in-law of Sarubai and accused no.1 Balasaheb started harassing Sarubai. They raised a demand for an amount of Rs.10,000/-. Sarubai used to inform about this fact to PW-1 Vilas Kondiba Chakankar. She also lodged a police complaint against both the accused as well as other relatives of accused no.1 Balasaheb. The case was registered by the Haveli police station and the accused were arrested. According to PW-1 Vilas

Kondiba Chakankar, the case was still pending and the husband of Sarubai was pressing for withdrawal of the complaint. PW-1 Vilas Kondiba Chakankar told accused no.1 Balasaheb to behave properly and had also told him that if his behaviour would improve, then the case could be withdrawn. However, there was no improvement in the conduct of accused no.1.

(c) The incident in question took place at about 9.30 P.M. on 3.8.2000. On the day and at time of the incident, the two accused, deceased Sarubai and the child Shivdeep who was born from the marriage, were present at the home of accused no.1. Shivdeep was then aged about 2 years and 8 months. He has been examined by the prosecution as PW-10 and according to his version he saw both the accused beat the deceased with a koyta. He saw his mother bleeding and therefore, started weeping. He saw his father and his grand mother stand on the stomach of the deceased and his father accused no.1 told him that he would be beaten if he did not stop crying. He saw his father putting a blanket on the face of his mother who was lying on the cot. His father told him that his mother was sleeping. The child continued to sleep near his deceased mother during the entire night.

(d) Sarubai used to sell vegetables for her living. PW-2 Nanda Shinde was a customer who used to buy

vegetables from her. Earlier to the incident, Nanda had purchased vegetables worth Rs.20/- on credit and on the day after the incident she wanted to pay her the due amount of Rs.20/-. She was not knowing the residence of the deceased and therefore, at about 11.00 A.M. on 4.8.2000 she went to call her sister Pinky who knew the residence of the deceased, and together with Pinky, she went to the residence of Sarubai. Pinky called Sarubai from the door of the house but since the door was not opened, Pinky pushed the door. From the threshold they saw Sarubai lying on the cot and her son Shivdeep (PW 10) was sitting on the cot. They saw a blanket covered on the body of Sarubai. Nanda asked Shivdeep as to what had happened, to which he replied that his mother was sleeping. Pinky uncovered the body of Sarubai. They found the face and body of Sarubai covered with blood. They got frightened and ran away from the place. Nanda went to her house while Pinky also left for her house. Pinky, who was examined as PW-3, informed about this incident to her Uncle Bapusaheb and also informed about what she had seen to her other family members including PW-4 Sunanda Chakankar who was an aunt of the deceased.

(e) On hearing the version of Pinky, (PW-4) Sunanda Chakankar and her husband rushed to the house of the accused. They found that the door of the house was

open. They saw Sarubai was lying on the cot on the left side of the door. Her face was covered with blood. They saw Shivdeep sitting on the cot and on seeing them, he started weeping and therefore, they brought him down and asked him what had happened. He told that quarrel had taken place between the deceased and accused no.1 Balasaheb and both the accused had killed his mother. That he had been kept near his mother and had thereafter gone to sleep and that both the accused had left the house. Bapusaheb then left the house to inform his brother PW-1 Vilas Kondiba Chakankar.

(f) PW-1 Vilas Kondiba Chakankar learnt about the incident from Bapusaheb between 11.00 & 12.00 A.M. He immediately went to the house of the accused. According to him, he saw that Sarubai was murdered and her son was sitting there. He also made enquiry with her son as to who has killed Sarubai and he was also told that both the accused had killed his mother. He saw that there were severe bleeding injuries on the head of Sarubai and blood was lying on the floor. There was no one else other than the dead body of Sarubai and Shivdeep in the house at that time. He immediately left for Haveli police station and lodged a complaint with the police. The said complaint was recorded by the police as per his say at (Exh.27).

(g) The complaint lodged by PW-1 Vilas Chakankar was recorded by PW-13 API Bajirao Dadaba Mohite who was then attached to the Haveli police station. He registered the crime as C.R.No.139/2000 for offences punishable under Sections 498-A and 302 r/w 34 of IPC and commenced investigation. Alongwith the police staff, he went to the scene of the offence and drew a panchanama of the scene of offence (Exh.32) in presence of 2 panchas. The scene of offence was a flat situated on the first floor of a building named as 'Datta-Ganesh Apartments'. At the time of the panchanama, he seized a quilt, sample of hair, sample of blood and hair lying on the floor. He then sent the body for post mortem to Sasoon hospital. At the Sasoon hospital, Police Head Constable Kadam prepared an inquest panchanama. Investigating officer Bajirao Mohite recorded the statements of 12 witnesses including the child witness Shivdeep. Police Constable Bhosale produced before him, the clothes of the person of the deceased and the same were attached by him under panchanama at (Exh.22). On the same day i.e. on 4.8.2000, he arrested accused Indubai at about 10.30 P.M. and referred her to the medical officer for examination. The arrest of Indubai was effected under arrest panchanama (Exh.59). On examination of Indubai the doctor issued a medical certificate (Exh.23) which indicated that she had a fracture in the area of her shoulder. He tried to find out the

whereabouts of accused no.1 Balasaheb but could not trace Balasaheb. On the next day he obtained the remand of accused Indubai. On 6.8.2000 he recorded the statements of 2 witnesses and continued the search of accused no.1 Balasaheb. On 9.8.2000 he learnt that accused no.1 was spotted at the Swargate bus stop and he thus arrested him at about 4.30 P.M. under an arrest panchanama (Exh.37). At the time of arrest accused no.1 was wearing a jeans pant and a blue coloured full sleves shirt. He seized and sealed the clothes on the person of accused no.1 Balasaheb and referred him to the medical officer for collection of his blood sample. Accordingly, a blood sample of Balasaheb was collected. On the same day he referred the attached articles to the C.A. through lady constable Mandhare at (Exh.60). On 10.8.2000 accused no.1 produced before the Magistrate and police remand was obtained for 5 days. On the way back from Magistrate's Court, accused no.1 Balasaheb expressed a desire to produce the weapon which he has used during the offence. API Mohite then called 2 panchas and recorded the memorandum statement of accused no.1. In pursuance of the memorandum statement, the panchas and the police party were led by the accused towards the Sinhagad road side. At the place below a bridge on the Bombay Bangalore Highway, near Vadgaon (BK) the accused asked the vehicle to be stopped. He led them near Mukti-Dham Cemetry and from a place

situated about 20 ft. near the road, the accused produced a koyata which was concealed in grass having a length of about 1 feet 4 inches and a width of around 1 & 1/2 inches. There were blood stains on the sharp side of koyata (Article-10). The investigating officer attached the said koyata under a panchanama and it was sealed. On 18.8.2000 he referred the remaining articles to the C.A. alongwith his forwarding letter (Exh.62). On 23.10.2000 he received the post mortem notes which indicated the several internal and external injuries suffered by the deceased which were as follows :-

1) Transverse incised wound starting 1 cm above and medial to medial end of right eyebrow, going laterally measuring 0.1 to 0.5 x 6 cm. Bone deep. clean cut linear fracture involving outer table of right frontal-correspondingly-4 cm ;

2) Incised injury 2 cm above and parallel to injury (1)- measuring 0.5 to 1 cm x 7 cm underlying frontal bone-Right shows clean cut depreased fracture in an area 0.2 x 6 cm- correspondingly ;

3) Transverse incised injury-mid point situated 3.5 cm above right pinna - measuring 0.5 to 2 cm x 11 cm bone deep. clean cut depressed fracture correspondingly over right parietral bone- 0.2 x 9 cm - parallel to saggial suture ;

4) Incised injury - joining posterior end of injury no.(3)- going upwards and forwards from joining point - measuring 0.5 x 8 cm underlying right parietral bone shows clean cut depressed fracture- 0.2 to 0.3 x 6 cm. fractured segment of right parietral bone at porterior region elevated exporing oranial cavity ;

5) Incised injuries - two in number - joining each other at anterior ends, saggirully oblique - measuring 0.5 x 8 cm (over right parital prominence) and 0.5 x 6 cm (over vertex). Right parietral bone shows clean cut depressed fracture 0.2 to 0.3 x 6

cm. vertex shows chipping of outer table in an area 1 x 2.5 cm.;

6) Hematomas - minimum - under scalp, red-over Right frontal 3 x 4 cm, 2 x 8 cm. Right parietal 8 x 12 cm. Right occiput 4 x 5 cm. ;

7) Anterior base of skull shows linear bracmres ;

8) Dura matter cut, lacerated corresponding to depressed fractured borry pieces ;

9) Subdural and subarachnoid heamorhage mainly on right half of brain ;

10) Fronto parietral lobes on right show contusion, laceration c/s hemorhagec. otherwise brain edematous.

The post mortem notes indicated that the injuries were antimortem and the cause of death was "due to head injury".

(h) On the same day, he deputed 2 police officers to Aurangabad to record the statements of the witnesses who were employees of Dipali lodge where accused had been residing from the 2nd to 3rd morning and from 4th to 9th of August-2000. On 6.11.2000 he submitted a charge-sheet after the completion of investigation. Thereafter he received the reports from the C.A. (Exh.63, 64, 65, & 66) and filed the same before the Court.

3. That after the receipt of the charge-sheet, in due course, the matter was committed to the Court of Sessions who framed the charges on 4.4.2001. In due course, the trial commenced. In order to prove its

case the prosecution examined in all 13 witnesses of which, PW-10 Shivdeep was the child witness who was also the sole eye witness. PW-1 Vilas Chakankar, PW-2 Nanda H.Shinde, PW-3 Nishigandha @ Pinky Chakankar and PW-4 Mrs.Sunanda B.Chakankar were examined by the prosecution as they had been to the house of the accused on the next day. PW-1 Vilas Chakankar and PW-4 Mrs.Sunanda B.Chakankar were also witnesses on the strained relationship between the accused and the deceased. PW-12 Dr.Shrikant Chandekar was examined to prove the post mortem notes (Exh.48). PW-5 Suresh Bhumkar was examined as a panch to prove the scene of offence panchanama (Exh.32). PW-7 Rajesh S.Bhujbal was examined as the panch to prove the seizure of the blood stained clothes of accused no.1 under panchanama (Exh.37). PW-8 Chandrakant A.Arakade was examined as the panch to prove the discovery of the koyta at the behest of accused no.1 under a panchanama dated 10.8.2000. PW-9 Kundlik Bankar who was the father of the deceased was examined to prove the strained relationship. PW-11 Santosh Raikar who was the relative of the accused was examined to indicate about some talk which he had with accused no.2 at the house of one Rajabhau immediately after the incident. PW-13 Bajirao D.Mohite was examined as the investigating officer.

4. From the cross-examination of the various

prosecution witnesses, and from the 313 statements as well as their separate written statements and documents produced at the stage of 313 statements, the defence of both the accused appeared to be of total denial. Accused no.1 contended that he had gone to Aurangabad for some work concerning Bajaj Auto on 2.8.2000. He had checked into Dipali lodge but since the rent of Rs.100/- per day was exhorbitant, on 3.8.2000 he had taken a single cot in the same lodge at the reduced rent of Rs.35/-. He claimed that he had been working at Aurangabad till 9.8.2000 when he returned back home. As far as accused no.2 Indubai was concerned, she claimed that her son had left for work on the previous day. In the evening she slipped, fell and injured herself. Since she was not on talking terms with the deceased, she went to the house of Rajabhau who alongwith PW-11 Santosh Raikar and some other family members and his mother took her to Trimurti hospital where she has admitted and from where she ultimately came to be arrested by the police. Accused persons however, chose not to lead any defence evidence.

5. On consideration of all the occular and documentary evidence before it, the trial Court passed the impugned judgment and order convicting and sentencing the accused persons as mentioned here-in-above. In the circumstances, the accused filed the present appeal.

6. We have heard both the sides and perused the entire record. In our view, the appeal requires to be partly allowed only in so far as accused no.2 is concerned for the following reasons :-

(A) Firstly, the prosecution relied upon the eye witness PW-10 Shivdeep. This witness is a child witness who was aged about 2 years and 8 months at the time of incident and about 4 years at the time of deposition before the Court. The trial Court did not administer oath to this child witness Shivdeep as he was unable to understand the sanctity of the oath. The witness however, stated that he had seen both the accused beat his mother with a koyta. He had seen the blood flowing and started weeping. He saw both the accused standing on the stomach of his mother. He saw his father put a godhadi on the face of his mother. Both the accused told him that they were going and that his mother was sleeping and saying so, they left. The child continued to sleep with his mother. In his cross-examination, the witness denied that he had been tutored or that anybody had asked him to come to the Court. He stated that he was presently residing with his maternal grand-father who treated him with affection. He stated that he used to normally sleep after taking meals and used to visit the house of PW-3 Nishigandha @ Pinky Chakankar. He stated that

on the day of the incident his father had left the house in the morning and returned in the evening. That he and his mother had taken meals together and had slept after the meals. He stated that his grand-mother had fallen, she had sustained an injury. He stated that his grand mother had gone to the Doctor and that his father accused no.1 had assaulted his mother. He claimed that his mother was beaten on the left side of the ear and that she had not caught the hand of accused no.1. He stated that he had put his hand on the injury of his mother and had not asked accused no.1 to take him alongwith him. He agreed that on the day of his examination-in-chief he had been told by the Government Pleader as to what is to be deposed in the Court and had deposed accordingly. He stated that there was an electric bulb in the house and the same was on when the deceased was assaulted. He agreed that his mother used to beat accused no.2. He stated that he had not seen any quarrel between the deceased and the father on the date of the incident. That he was weeping at the time of assault by accused no.1 on his mother. He was weeping because his father had assaulted his mother. He admitted that there was koyta in the hand of accused no.1 and stated that his father taken the koyta from the place where dirt had been collected and after the assault he has kept the same koyta at the same place. He stated that his mother was in a

sleeping position when accused had stood on her stomach. She was then sleeping on the cot facing upwards. He has seen both the accused standing on the stomach of the deceased at the same time. He stated that he slept in the night and got up in the morning by himself. He admitted that PW-3 Nishigandha @ Pinky had come on the next day morning and had entered the house and that Pinky thereafter removed the godhadi from the face of his mother. He stated that when Pinky asked him about the deceased he had told her that she was sleeping. He denied that he did not know about the incident and categorically stated that his eyes were open. The Advocate for the accused contended that the testimony of a child witness should be accepted with greatest caution and circumspection. She relied upon the observation of a division bench of this Court in the case of **Narayan Kanu Datavale Vs. State of Maharashtra reported in 1997 CRI.L.J. 1788,** wherein this Court observed as follows :-

> It is well settled that the testimony of a child witness should only be accepted after the greatest caution and circumspection. The rationale for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose about things which he has not seen and once having been tutored, he goes on repeating in a parrot like manner what he has been tutored to state.

Reliance was also placed upon the judgment of the Apex Court in the case of **Arbind Singh Vs. State of Bihar reported in 1995 Supp (4) Supreme Court Cases 416** wherein in paragraph-3, after dealing with the version given by the child witness who was 5 years on the date of the incident, the Apex Court observed as follows :-

> Having taken a careful look at the evidence of this child witness we are of the opinion that implicit faith and reliance cannot be placed on her testimony since it is not corroborated by any independent and reliable evidence. It is well-settled that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring.

7. We are alive to the aforesaid position of law as regards the evidence of a child witness. In the facts of the present case however, we are not willing to accept that the child witness was tutored. The child witness did admit in the cross-examination that on the day of his examination-in-chief he was told by the Prosecutor as to what is to be deposed in Court. This is not tantamount to an admission that he was tutored to depose to something which he had not seen. There is a settle difference between the refreshing of the memory of a witness and tutoring him to depose falsely about something which he has not seen. A suggestion was made by the Advocate for the defence

to his witness that he was not seen anything but this was denied by the child witness. We have already mentioned here-in-above the salient features of the evidence of this child witness. We find that there is no material contradiction with his police statement. However, we have scanned the record to cull out circumstances which would corroborate the version given by him and in this regard we find that there is material & sufficient corroboration to his evidence in so far as the assault by accused no.1 is concerned though there are certain circumstances which lead us to hold that there is insufficient corroboration as far as the alleged assault by accused no.2 is concerned.

8. The circumstances which lend corroboration to the evidence of the child witness regarding assault by accused no.1 on the deceased are as follows :-

(i) That on his arrest the clothes of the accused were found to have blood stains. The C.A. report indicates that pant was stained with human blood and the shirt was having blood group ‘O’ which was also the blood group of the deceased. In this regard it was contended by the Advocate for the accused that it was unbelievable that Balasaheb was wearing a blood stained shirt 5 days after the incident. We are however, not convinced. It was argued that accused no.1 was staying in a public lodge from

4.8.2000 till 9.8.2000. It is inconceivable that he was using the same blood stained shirt for 5 days. Firstly it must be born in mind that accused no.1 is alleged to run away immediately after the incident. He may not be carrying fresh clothing with him. His own statement indicates that he was short of money and changed his residence from a room to a cot where lesser rent of Rs.35 was charged. It is thus possible that he may not have sufficient money to buy a new set of clothes. It is also possible that he was using the same shirt by washing as the C.A. report indicates that the blood stains found on the shirt were faint (pusat). We have also seen the shirt in question. It is of a dark blue colour and is not of a colour where stains would become immediately apparent. It was further contended that admittedly the blood of the deceased was collected in a bottle which was available at the police station till 9.8.2000 on which date the accused was arrested. It was sent to the C.A. on 9.8.2000. It was suggested that the police must have put this blood on the clothes of the accused before the bottle was sent for chemical analysis on 9.8.2000. We are unable to accept this argument. We find that arrest of the accused has been effected under a panchanama at the hospital and the pancha speaks about the sealing of clothes of the accused. The C.A's report also indicates that the articles received by him were sealed. There is no

cross-examination challenging this aspect of sealing. The suggestion was that this blood was put on the clothes by the investigating officer but there is no material on record to support the theory of the police having stained the clothes of accused no.1 with the blood of the deceased collected in a bottle. Finding of blood staines on the clothes of accused no.1 therefore, is a circumstance which corroborates the version of the child witness relating to the presence of accused no.1 at the scene of the offence and also negates the alibi raised by accused no.1.

(ii) The finding of blood of human origin on the koyta is another circumstance which corroborates the child witness and connects the accused with the crime. It was sought to be contended that this discovery was unbeliavable because it was the specific defence of the accused that he was in the lock-up at Vishram bagh police station at the time of the recording of the discovery panchanama. Our attention was drawn to the fact that the application had been made for production of the lock-up register but the prosecution had filed a letter from the police stating that the lock-up register of the police station for the month of August was un-available. We were therefore, called upon to draw an adverse inference against the prosecution. We however, cannot draw any such adverse inference

as an independent panch witness has been examined by the prosecution to prove the discovery of the weapon at the behest of accused no.1. This panch witness is PW-8 Chandrakant Arakade. He stated in his evidence that he was called to act as a panch by the police on 10.8.2000. Accused no.1 and some police officers were at the police station. Another panch by name Pandurang Jagtap was also present in the police station. Accused no.1 made a statement before the panchas that he was willing to produce the koyta which was used in the assault. This was reduced into writing by the police and the statement (Exh.39) was also signed by him. He thereafter deposed that they, alongwith police party and the accused went in a jeep to Vadgaon at about 4-00 to 4.30 P.M. and the accused asked the jeep to be stopped in front of Muktidham Crematory. Thereafter the accused led them to the north side. The accused took them to a place about 20 feet from Muktidham. The accused removed the earth below his leg and removed a sickle. The C.A's report indicates that the blood on the sickle was human though the blood group could not be determined. It must be borne in mind that by 10.8.2000, the bottle containing the blood of the deceased had already been dispatched to C.A. on the earlier day. Finding of human blood on the koyta therefore, cannot be criticised on the ground that police must have sprinkled the blood from the bottle in which blood of the deceased was

kept. It is true that blood group of the human blood stains on the koyta could not be determined by the C.A. In this regard the learned APP relied upon the judgment of the Apex Court in the case of **Khujji Vs. State of M.P. reported in (1991) 3 SCC 627,** in which the Apex Court in paragraph-10 concluded that the finding of human blood on the weapon and clothes of the accused can be a material circumstance. We are therefore, constrained to hold that this is the 2nd corroborative circumstance which corroborates the evidence of the child witness and connects the accused no.1 with the incident.

(iii) The next circumstance is the absconsion of the accused no.1 from the scene of offence and his continued absconsion till 9.8.2000. We are not inclined to accept the alibi which has been sought to be set up by the accused. The police have examined PW-6 Dilip Raut who was the manager of Dipali lodge where the accused no.1 was staying on a day earlier and after the incident. This witness states that accused no.1 had come to the lodge at about 7.45 p.m. on 2.8.2000 and left the lodge at about 8.30 A.M. on 3.8.2000. At the time of entry, he has paid an advance amount of Rs.200/- and an entry was taken in the register in his hand-writing. Accused no.1 had signed the register against that entry. He proved the copy of the entry and the same was exhibited as Exh.34. He stated that accused

no.1 again came to the lodge on 4.8.2000. On that occasion he stayed in a general room having cots and the entry was taken at Sr.No.1 in the register. He stayed in the lodge upto 9.8.2000 and left at 7.00 A.M. on 9.8.2000. These entries were taken on record at Exh.35. We have seen these entries. They corroborate the evidence of this witness and demolish the plea of alibi which we find to be false. The accused no.1 had come out with the case that he never left the lodge at Aurangabad and only changed from a room to a single cot on 2.8.2000. We however, find that he has signed the entry of checking out at 8.30 A.M. on 3.8.2000. There is no cross-examination pertaining to his signature and the said signature has not been denied by him. If he had checked out at 8.30 A.M. he had sufficient time to travel to Pune by 9.30 P.M. on that day. Further more, if he had taken a single cot, the entry in this regard should be of 3.8.2000. The entry however, is of 4.8.2000. This demolishes the theory of alibi. The negation of his plea of alibi and the false defence taken in this regard is also circumstance which corroborates the version of the child witness that his father was present in the house on the night of 3.8.2000 and had come back from his work on that day.

9. As regards accused no.2 Indubai, however, we find that the child witness states that only his

father had a koyta in his hand and had collected the same from the dirt and had returned the same near the dirt after the incident. It was sought to be argued that this version of the child witness falsified the evidence of discovery. It is possible that accused may have carried the weapon from the dirtpit and the child aged 2 years and 8 months who was inside the house may not have seen what was done with the weapon by the accused. The child witness has however, nowhere stated in his evidence that the accused no.2 was carrying a koyta. It is not the case of the prosecution that there was any blood stains found on the clothes of accused no.2. It also appears from the record that accused no.2 was suffering from a fracture which appears to have been sustained on the night of the incident. The record indicates that she was taken to Trimurti hospital and admitted there at about 10.00 P.M. Though after arrest she was again examined by the Medical officer at the behest of the police and the certificate does indicate that she had fracture in the shoulder region. We see this injury in the light of the statement of the child witness that his mother used to beat accused no.2. Accused no.2 has come out with the defence that she slipped and fell and suffered the fracture on her shoulder. It does appear from the evidence on record that accused no.2 suffered a fracture on the shoulder for which there is no proper explanation coming forward from the

prosecution. It is also seen that the evidence relating to disclosure and pertaining to the overt-act of accused no.2 has a lacuna. When Nanda & Pinky asked the child witness, he only told them that his mother was sleeping. No doubt, PW-1 Vilas Chakankar and PW-4 Mrs.Sunanda Chakankar talked about the child witness disclosing to them that the deceased was assaulted by both the accused. The FIR of Vilas Chakankar however, does not corroborate this fact as the same only talks about the assault by accused no.1. There is no discovery of weapon at the behest of accused no.2 and in our view, this is a case where in the circumstances, a doubt is raised regarding involvement of accused no.2 in the actual assault on the deceased and in the circumstances, accused no.2 can be given the benefit of doubt.

10. The record further indicates that the accused persons were ill-treating the deceased. In fact, the deceased had filed a case under Section 498-A. It is sought to be contended that the said case has resulted in an acquittal long before the incident. Be that as it may, even assuming that there was acquittal, the record indicates that the deceased was staying in a separate room. In her defence, accused no.2 stated that she was not with talking terms with the deceased. The child witness stated that his mother used to beat his grand-mother. It is clear from the record that there was acrimony

between the deceased on one hand and the accused on the other hand which had led the deceased to file criminal complaint against accused and their relatives. The motive thus existed.

11. It was then sought to be contended that as per the evidence of the child witness the deceased must have beaten accused no.2 and caused her fracture and therefore, accused no.1 assaulted the deceased in retaliation. A faint attempt was made to argue that the offence was therefore, punishable under Section 304 of the IPC. We cannot, accept this argument for the simple reason that this is not a defence of the accused. It was contended that even the defence was false yet if material could be found from the prosecution evidence and if the mitigating circumstances can be gleaned from such evidence then benefit should go to accused no.1. We find no such material in the prosecution evidence. It is not the version of the child witness that accused no.2 was beaten any time immediately prior to the incident. In any case, the benefit of exception-4 to Section 300 of IPC cannot be given because the same requires that the act should be committed in a sudden fight, in the heat of passion upon a sudden quarrel and without the offender’s having taken undue advantage or acted in a cruel or unusual manner. In the present case we find that the number of injuries clearly indicate that even if other ingredients of

exception-4 can be deduced, yet by causing so many injuries on the vital parts, accused no.1 cannot be said not to have acted in a cruel or unusual manner. The submission advanced in this regard is therefore, rejected.

11. In the net result, the appeal of accused no.1 fails. The appeal filed by accused no.2 succeeds and we pass the following order :-

O R D E R

(1) The conviction and sentence of accused No.2 Indubai Dattoba Badhe is quashed and set aside and she is acquitted of all charges. The fine if any paid by her, will be refunded. Her bail bond stands cancelled.

(2) The conviction and sentence of accused No.1 Balasaheb Dattoba Badhe stands confirmed.

(3) Appeal stands disposed off accordingly.

(R.S.Mohite,J) **(S.B.Mhase,J)**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.262 OF 2007
IN
CRIMINAL APPEAL NO.1095 OF 2002

Sou.Indubai Dattoba Badhe ..Applicant
V/s.
The State of Maharashtra ..Respondent

Mrs.Revati Mohite-Dere for the applicant.

Mrs.V.R.Bhosale APP for the State.

Coram : S.B.Mhase &
R.S.Mohite,JJ

Date : 23.03.2007.

PC

1. Heard both sides.

2. This is an application for recording the evidence of various witnesses on the ground that material omissions have not been brought on record by the Advocate who appeared. In our view, sufficient chance was given to the defence to bring omissions on record and therefore, there is no substance in this application and hence, application stands rejected.

(R.S.Mohite,J) **(S.B.Mhase,J)**